E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-117

CHARLES JOSEPH KASTIGAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MICHAEL GOREAN STEWART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	4
ARGUMENT—A witness may not be compelled to testify before a federal grand jury over his claim of Fifth Amendment privilege against self-incrimination when the immunity offered by federal statute is merely immunity from use of the grand jury testimony which leaves the witness subject to prosecution for the transaction concerning which he would be required to testify	8
CONCLUSION	35
CERTIFICATE OF SERVICE	35

Cases Cited

Adams v. Maryland, 347 U. S. 179 (1954) 17

Albertson v. Subversive Activities Control Board, 382 U. S. 70 (1965) 23, 24

Boyd v. United States, 116 U. S. 616 (1886) 29

Brown v. Walker, 161 U. S. 591 (1896) 15, 16, 18

Carol Vericker, In re, No. 71-1656 (2d Cir., 1971) 3

Counselman v. Hitchcock, 142 U. S. 547 (1892) 8, 10-16, 20, 24, 26, 32, 33

Cullen v. Commonwealth, 24 Grat. 624 (1873) 11, 14

Dellinger v. Mitchell, No. 23,931 (D. C. Cir., 1971) 2

Dionisio, In re, 39 L.W. 2561 (March 25, 1971) 3

PAGE

Dombrowski v. Eastland, 387 U.S. 82 (1967) 2

Dombrowski v. Pfister, 380 U.S. 479 (1965) 2

Elizabeth Begley, In re, No. 71-1708 (2d Cir.) (appeal pending) 3

Emery's Case, 107 Mass. 172 (1871) 11, 12, 14

Feldman v. United States, 322 U.S. 487 (1944) 20

Hale v. Henkel, 201 U. S. 43 (1906) 16

Higdon v. Heard, 14 Ga. 255 (1853) 11

Joques Egan, In The Matter Of, No. 71-1088 (3d Cir., 1971) (*en banc*) 3

Joanne Kinoy, In The Matter Of The Grand Jury Testimony Of, 326 F. Supp. 407 (S. D. N. Y., 1971) 2, 3, 6, 10, 31

Knapp v. Schweitzer, 357 U.S. 371 (1958) 20

Korman, In re, No. 71-1328 (7th Cir., 1971) 6, 10

La Fontaine v. Southern Underwriters, 83 N. C. 132 (1880) 11

McCarthy v. Arndstein, 266 U. S. 34 (1924) 16

McElrath, In re, 248 F. 2d 612 (D. C. Cir., 1957) 7

McSurely v. Ratliff, 282 F. Supp. 848 (E. D. Ken., 1967) 2

Murphy v. Waterfront Commissioner, 378 U. S. 52 (1964) 19-23, 25, 26, 28

NSA v. Hershey, 412 F. 2d 1103 (D. C. Cir., 1969).... 2

People v. Kelly, 24 N. Y. 74 (1861) 11, 14

People v. Sharp, 107 N. Y. 427 (1887) 13

PAGE

Piccirillo v. New York, 400 U. S. 548, 91 S. Ct. 520, (1971) 25

Powell v. McCormack, 395 U.S. 486 (1969) 2

Reina v. United States, 364 U. S. 507 (1960) 18

Rowe, Ex Parte, 7 Cal. 184 (1857) 11

Smith v. United States, 337 U. S. 137 (1949) 15, 17

Smith v. University of Tennessee, 300 F. Supp. 777 E. D. Tenn., 1969) 2

Soglin v. Kaufman, 418 F. 2d 163 (7th Cir., 1969).... 2

Stanley v. Georgia, 394 U. S. 557 (1969) 29

State v. Nowell, 58 N. H. 314 (1878) 11, 13, 14

State v. Quarles, 13 Ark. 307 (1853) 11

Stevens v. Marks, 383 U.S. 234 (1966) 24

Stewart v. United States, 440 F. 2d 954 (9th Cir. 1971) 7

Ullman v. United States, 350 U. S. 422 (1956) 15, 18-20, 23

Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation, 426 F. 2d 619 (2nd Cir., 1970), cert. pending, No. 69-6 (Oct. Term, 1971) 32

United States v. DiMauro, 441 F. 2d 428 (8th Cir., 1971) 7

United States v. Monia, 317 U. S. 424 (1943) 17

United States v. Murdock, 284 U. S. 141 (1931 .....17, 20

Wilkins v. Malone, 14 Ind. 153 (1860) 11

Wood v. Georgia, 370 U. S. 375 (1962) 3

PAGE

United States Constitution Cited

Article III, Section 2 7

First Amendment 29

Fourth Amendment 29

Fifth Amendment 2, 6-10, 14-21, 24, 25, 28, 29, 31, 33

Statutes Cited

Bill of Rights 35

Pub. L. 91-452, Section 260, Title II, Organized Crime Control Act of 1970 .....2, 4, 7

Subversive Activities Control Act of 1950, Section 4(f) 23

11 Stat. 155 (1857) 9

12 Stat. 333 (1862) 9

15 Stat. 37 (1868), Rev. Stat. Section 860 9

24 Stat. 379, Interstate Commerce Act of 1887 ..... 8, 9

27 Stat. 443 15

30 Stat. 544 (1898) 16

64 Stat. 992 23

68 Stat. 745, Immunity Act of 1954 18

84 Stat. 922 4

11 U.S.C., Section 25(a) 10 16

18 U.S.C.:

Section 371 29

Section 1406 ..... 7, 18

PAGE

18 U.S.C.:

Section 2514 ..... 5, 7

Section 2516 ..... 6, 7

Section 3486 7

Section 3486(c) 18

Section 6002 ..... 2, 4-8, 23, 26, 28, 30, 31

Section 6003 ..... 2, 4, 5, 7, 8, 23, 30

49 U.S.C., Section 46 (1893) 15

50 U.S.C., Section 783(f) 23

Other Authorities Cited

Beveridge, The Assault upon American Fundamentals, 45 Reports of American Bar Ass'n, 188, 216 (1920) 34

Griswold, The Fifth Amendment Today (Harvard University Press, 1962), p. 80 ..... 18, 30

H. Report No. 91-1549, United States Code Congressional and Administrative News, p. 4018 7

Rogge, "Compulsory Testimony Act," New York Law Journal, May 3, 1971, pp. 1, 4 9

8 Wigmore, Evidence, (McNaughton Rev. 1961), pp. 302 et seq. 25

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BRIEF OF *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Center for Constitutional Rights, Inc. (hereinafter referred to as the Center), a non-profit corporation duly

organized and existing under and by virtue of the laws of the State of New Jersey, was formed in August 1966 for the purpose, among others, of furnishing legal assistance when requested to do so to persons anywhere in the United States whose civil rights or civil liberties were jeopardized. Accordingly, its lawyers, both staff and advisory, have since its formation been steadily involved in civil and criminal litigation in numerous jurisdictions. Center attorneys have successfully represented clients before this Court[1] and many federal circuit[2] and district courts.[3]

Of particular relevance to the instant matter, Center attorneys represented the witness in *In The Matter Of The Grand Jury Testimony Of Joanne Kinoy,* 326 F. Supp. 407 (S. D. N. Y., 1971), a case involving precisely the same issues as is before the Court here. In *Kinoy,* the court held that, in failing to provide transactional immunity, 18 U.S.C. §§6002-3, the 1970 federal compulsory testimony act, violates the Fifth Amendment privileges against self-incrimination.[4]

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[1] E.g., *Powell* v. *McCormack,* 395 U.S. 486 (1969); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965).

[2] *Dellinger* v. *Mitchell,* No. 23,931 (D. C. Cir., 1971); *Soglin* v. *Kaufman,* 418 F. 2d 163 (7th Cir., 1969); *NSA* v. *Hershey,* 412 F. 2d 1103 (D. C. Cir., 1969).

[3] *Smith* v. *University of Tennessee,* 300 F. Supp. 777 (E. D. Tenn., 1969); *McSurely* v. *Ratliff,* 282 F. Supp. 848 (E. D. Ken., 1967).

[4] The government, respondent here, did not appeal *Kinoy,* although it was the first case testing the constitutionality of Sections 6002-3. (The act went into effect on December 15, 1970. See Title II, Organized Crime Control Act of 1970, Pub. L. 91-452, Section 260. The government applied to the district court for an order compelling Ms. Kinoy to testify on January 11, 1971. The application was denied on January 29.)

Center attorneys have continued to represent numerous persons compelled to appear before federal grand juries[5] and to consult with attorneys representing other grand jury witnesses.[5a] Our experience in the past several months has given us cause for much concern. We have witnessed the implementation of what appears to be a conscious and consistent policy by the respondent to employ the grand jury and grand jury process throughout the United States as an arm of the executive branch. Contrary to the historical and constitutional function of the grand jury as a body which would stand between the citizen and his government, acting to protect the former against the excesses of the latter, *cf. Wood* v. *Georgia*, 370 U. S. 375, 390 (1962), federal grand juries are now being employed to perform what is ordinarily the investigatory and crime detection role of the Federal Bureau of Investigation. So, for example, the United States Court of Appeals for the Seventh Circuit recently disapproved an investigation conducted under the aegis of a federal grand jury, an investigation which it found was in reality a "fishing expedition." See *In re Dionisio*, 39 L.W. 2561 (March 25, 1971). Misuse of the grand jury as an institution was also apparent in *Kinoy, supra*, where the United States Attorney admitted in a sworn affidavit that one of the reasons the witness' testimony was sought was "to determine the whereabouts of [a fugitive] so that she may be apprehended."

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[5] E.G., *In re Carol Vericker*, No. 71-1656 (2d Cir., 1971); *In re Elizabeth Begley*, No. 71-1708 (2d Cir.) (appeal pending).

[5a] E.G., *In the Matter Of Joques Egan*, No. 71-1088 (3d Cir., 1971) (*en banc*); *In re Carol Evans*, No. 71-1499 (D. C. Cir., 1971).

We believe that the statute in issue here, 18 U. S. C. §§6002-3, poses an appreciable threat of compounding this kind of distortion of the purpose and function of the grand jury; we believe such distortion poses a substantial threat to the civil liberties of all Americans. As attorneys and as citizens, we are therefore moved to present to this Court our view on the constitutionality of that provision.[6]

Statement of the Case

Petitioners were each summoned to appear and testify before a grand jury in Los Angeles, California, on February 4, 1971.

Before being examined, however, petitioners were requested to and did appear with counsel before the United States District Court for the Central District of California (Crary, J.). At that time the Assistant United States Attorney presented a written application for an order compelling petitioners to testify pursuant to Title II of the Organized Crime Control Act of 1970, Pub. L. 91-452; 84 Stat. 922.

That compulsory testimony provision, which is Title 18 United States Code §§6002-3, represents a marked departure from prior federal immunity statutes. The sharpest change is in the failure to maintain the standard of transactional immunity. Rather than providing immunity from prosecution for the transaction concerning which the witness is compelled to testify, Section 6002 provides only immunity from the direct or indirect use of that testi-

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[6] Both petitioners and respondent have consented to the filing of this brief *amicus curiae*. Their letters of consent are filed with the clerk of this Court.

mony, thus leaving prosecution for the transaction a very real possibility:

> §6602. Immunity generally
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[6a]

[6a] Compare 18 U.S.C. § 2514:

> § 2514. Immunity of witnesses
>
> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or

(*Footnote continued on following page*)

Of the three federal courts which have heretofore issued opinions on its constitutionality, two have concluded that in merely providing use immunity, the Act violates the Fifth Amendment privilege against self-incrimination. See *In re Korman,* No. 71-1328 (7th Cir., 1971), a unanimous decision handed down on May 20 of this year, and *In The Matter Of The Grand Jury Testimony Of Joanne Kinoy,* 326 F. Supp. 407 (S. D. N. Y., 1971). Only the Ninth Circuit Court of Appeals, whose judgment is reviewed here, has thought Section 6002 adequately pro-

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(*Footnote continued from preceding page*)

proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

tects Fifth Amendment interests. See *Stewart* v. *United States,* 440 F. 2d 954 (9th Cir., 1971).[7]

It was on the ground that Section 6002 failed to provide immunity coextensive with the privilege against self-incrimination that petitioners opposed the government's application in the district court below. When the application was approved, that same objection was the basis of petitioners' refusal to answer questions before the grand jury. They were thereafter adjudged in civil contempt for refusal to testify and committed to the custody of the Attorney for the life of the grand jury or until the questions were answered. The judgment of the district court was affirmed by the Court of Appeals on March 10, 1971. Certiorari was granted on May 17, 1971, 91 S. Ct. 1668, to review the judgment of the Court of Appeals.

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[7] Also unlike prior general federal immunity statutes, the 1970 Act allows for the conferring of immunity in the investigation of possible violation of *any* federal statutes. Prior acts authorized immunity only in investigations under certain enumerated federal statutes. See, e.g., 18 U.S.C. § 3486, 18 U.S.C. § 1406 and 18 U.S.C. §§ 2514, 2516.

Sections 6002-3 further depart from prior immunity provisions in authorizing the granting of immunity prospectively; i.e., even before the person subpoenaed has appeared before the grand jury. "This sets aside the result that obtained in *In re McElrath,* 248 F. 2d 612 (D. C. Cir., 1957)." H. Report No. 91-1549, *United States Code Congressional and Administrative News,* p. 4018. Compare also *United States* v. *DiMauro,* 441 F. 2d 428, 440-1 (8th Cir., 1971). The question of the constitutionality of such an immunity, under Article III, Section 2 and the Fifth Amendment, has not been raised by petitioners. (If the privilege against self-incrimination may not be pleaded in advance of appearance before the grand jury, it is difficult to see how an order compelling testimony over that privilege may be obtained at that time.)

Nor has there been raised before the Court in this case the issue whether in taking from the district court any and all judicial function and leaving the court a purely ministerial, "rubber stamp" role, the 1970 Act violates the principle of separation of powers.

ARGUMENT

A witness may not be compelled to testify before a federal grand jury over his claim of Fifth Amendment privilege against self-incrimination when the immunity offered by federal statute is merely immunity from use of the grand jury testimony which leaves the witness subject to prosecution for the transaction concerning which he would be required to testify.

We respectfully submit that the compulsory testimony statute, 18 U.S.C. §§6002-3, providing as it does mere immunity from the use of grand jury testimony in a subsequent prosecution of the witness rather than immunity from prosecution arising out of the transaction to which the testimony relates, violates the privilege against self-incrimination safeguarded by the Fifth Amendment. It offends the plain meaning of the amendment and cannot be reconciled with the authoritative decision of this Court in *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892) or with the values which the privilege against self-incrimination was intended to protect.

The unanimous decision in *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), is dispositive of the issue in this case and mandates the conclusion that the 1970 compulsory testimony provision is unconstitutional.

Counselman was the first case in which this Court passed upon the constitutional sufficiency of a federal statute which sought to compel testimony before a federal grand jury after a witness had refused to answer questions on the ground that the answers might tend to incriminate him. The occasion was a federal grand jury investigation into alleged violation of the Interstate Com-

merce Act of 1887, 24 Stat. 379. The witness Counselman, invoking the privilege against self-incrimination, refused to answer certain questions put to him and maintained his silence even after he was ordered by the district judge to testify pursuant to Rev. Stat. Section 860, 15 Stat. 37 (1868). He was thereupon deemed in contempt of court.

Section 860 commanded a witness to testify over his claim of privilege and provided as follows:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.[8]

In reviewing Counselman's contention that Section 860 was violative of the privilege against self-incrimination, Justice Blatchford declared for the Court that the privilege "is as broad as the mischief against which it seeks to guard," *supra* at 562, and that for a compulsory testimony act to comport with the Fifth Amendment it must be "co-extensive with the constitutional provision." *Id.* at 565.

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[8] The history of Section 860 and of 11 Stat. 155 (1857) and 12 Stat. 333 (1862), the federal compulsory testimony acts which preceded it, is detailed at length in Rogge, "Compulsory Testimony Act," New York Law Journal, May 3, 1971, pp. 1, 4.

The Court's conclusion as to what kind of immunity was required if a compulsory testimony act were to comport with the privilege was unequivocal:

> We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which it relates. *Id.* at 585-6.

Counselman's conviction was therefore reversed.

Despite the unmistakable clarity of the Court's conclusion, the Government has contended that the language in *Counselman* was really *dictum* not intended to be the holding of the case.[9] Such an argument ignores the analysis employed by this Court in overturning Counselman's conviction and the context in which the principle was announced.

The conclusion that a compulsory testimony statute satisfies the Fifth Amendment only if it provides transactional immunity was reached after a careful review of numerous cases that had considered the question. Signifi-

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[9] See, e.g., *In re Korman*, *supra*, Slip Op., pp. 3-7, and *In The Matter Of The Grand Jury Testimony Of Joanne Kinoy*, *supra* at 412-5. Both the Seventh Circuit and Judge Motley flatly rejected this argument.

cantly, the Court in *Counselman* adopted what had previously been the minority rule. It noted such cases as *State* v. *Quarles,* 13 Ark. 307 (1853); *Higdon* v. *Heard,* 14 Ga. 255 (1853); *Ex Parte Rowe,* 7 Cal. 184 (1857); *Wilkins* v. *Malone,* 14 Ind. 153 (1860); *People* v. *Kelly,* 24 N. Y. 74 (1861); and *La Fontaine* v. *Southern Underwriters,* 83 N. C. 132 (1880). All these cases supported the Government's position in *Counselman,* namely that a compulsory testimony statute need not provide transactional immunity for it to be co-extensive with the privilege. This Court, however, declined to follow those cases and instead adopted the principle adhered to in *Emery's Case,* 107 Mass. 172 (1871); *Cullen* v. *Commonwealth,* 24 Grat. 624 (1873); and *State* v. *Nowell,* 58 N. H. 314 (1878).

In the Massachusetts case, Emery invoked the privilege against self-incrimination and refused to answer questions propounded to him even after being ordered to respond on the basis of a statute which precluded any subsequent use of his testimony against him. Convicted of contempt, Emery brought his conviction before the state supreme court and that tribunal, referring to the privilege, concluded as follows:

> [N]o one can be required to forego an application to its protection, unless first secured from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be served by availing himself of the privilege accorded by the Constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate.

The court continued:

> Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein.[10]

Because the Massachusetts statute did not provide transactional immunity, Emery had the right to remain silent and his conviction was therefore reversed.

In the Virginia case, Cullen refused to reply to questions asked him by a grand jury on the ground that the answers would tend to incriminate him. On appeal, the Virginia Court of Appeals found that the compulsory testimony act in question, which provided only use immunity, did not fully protect the witness from the mischief against which the privilege sought to guard and Cullen's conviction was reversed. The *Counselman* Court described the Virginia opinion as follows:

> The court held that the effect of the statute was to invade the constitutional right of the citizen, and to deprive the witness of his constitutional right to refuse to give evidence tending to criminate himself, without indemnity, and that the act was therefore, to that extent unconstitutional and void. It held further that, before the constitutional privilege could be taken away by the legislature, there must be absolute immunity provided; that nothing short of complete amnesty to the witness, an abso-

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[10] *Emery's Case* is quoted and discussed at length in *Counselman*, 142 U.S. at 571-6.

> lute wiping out of the offense as to him, so that he could no longer be prosecuted for it, would furnish that indemnity. 142 U. S. at 577.

Justice Blatchford further relied upon *State* v. *Nowell, supra,* wherein the contempt conviction of a witness who had refused to testify before a grand jury was upheld. The Justice described the state court's opinion in the following terms:

> In regard to the statute, the court said that the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; that he was to be secured against all liability to future prosecution as effectually as if he were wholly innocent; that this would not be accomplished if he were left liable to prosecution criminally for any matter in respect to which he might be required to testify; that the statute of New Hampshire went further than the statute of Massachusetts considered in *Emery's Case,* because it provided that the witness had, under the statute, all the protection which the common-law right, adopted by the Bill of Rights in its common-law sense, gave him; that, if he should be prosecuted, a plea that he had disclosed the same offense on a lawful accusation against his principal would be a perfect answer in bar or abatement of the prosecution against himself; and that unless he should testify, the motion for the attachment must be granted. *Id.* at 578-9.[11]

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[11] The Court also cited and discussed with approval *People* v. *Sharp,* 107 N. Y. 427 (1887), wherein the New York Court of Appeals had upheld the compulsion of incriminating testimony about a crime where the witness was made immune from future prosecution for that crime.

This Court expressly chose the rule of transactional immunity in overturning Section 860. After stating that rule, quoted *supra,* at p. 10, the Court continued in the very next sentence: "In this respect, we give our assent rather to the doctrine of *Emery's Case,* in Massachusetts, than to that of *People* v. *Kelly,* in New York; . . ." *Id.* at 586. *Emery* had demanded transactional immunity to sustain compulsory testimony, whereas *Kelly* had accepted use immunity as sufficient.[12]

That this Court was consciously and intentionally adopting the rule of transactional immunity followed in *Emery, Cullen* and *Nowell* was understood by the Government itself which, in its final argument, urged that those cases be distinguished because they involved privileges somewhat broader in language than the privilege honored in the Fifth Amendment. But this Court expressly rejected the effort: "[W]e are of opinion that, however this difference may have been commented on in some of the decisions, there is really, in spirit and principle, no distinction arising out of such difference of language." *Id.* at 586. In this way the Court emphasized what it had just stated, that it was giving its "assent" to the doctrine of *Emery's Case.*

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[12] The statement in the sentence in *Counselman* which follows the sentence just quoted in part in the text above ("Section 806, moreover, affords no protection against the use of compelled testimony which consists in gaining therefrom . . . information which may supply other means of convicting the witness or party."), in no way detracts from the Court's holding. The Court was merely adding as an afterthought to its discussion of the need for transactional immunity that the statute did not even accomplish in fact what it purported to do: that it did not protect the witness from the indirect use of his testimony in a subsequent criminal proceeding.

It was not only the executive branch which recognized that *Counselman* stood for the proposition that a compulsory testimony statute, to comport with the Fifth Amendment, must provide transactional immunity. In the year following, the Congress passed a new statute, 27 Stat. 443, 49 U. S. C. §46 (1893), which provided that no person could refuse to testify before the Interstate Commerce Commission on the ground that answers might incriminate him. But, the statute continued, "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding." It has been noted that in enacting the 1893 statute, Congress broadened the scope of the protection to be afforded by a compulsory testimony provision specifically in order to satisfy the *Counselman* requirement of transactional immunity. *Smith* v. *United States,* 337 U. S. 137, 146-7 (1949); see also *Ullman* v. *United States,* 350 U. S. 422, 436-7 (1956).

When this Court reviewed the 1893 act in *Brown* v. *Walker,* 161 U. S. 591 (1896), the issue was whether *any* kind of immunity could displace the privilege against self-incrimination. The argument was not transactional immunity versus the kind of immunity afforded by the 1970 act in question here. Rather, the question was whether even transactional immunity was constitutionally sufficient. Even while the 1893 act was sustained, four Justices dissented on the ground that a witness' right to remain silent was absolute: even immunity from prosecution was inadequate protection from the infamy and disgrace attendant upon self-revelation of guilt against

which the privilege was intended to protect. The important point is that all the Justices, both those in the majority and those who dissented, assumed that the Fifth Amendment required *at least* transactional immunity in a compulsory testimony provision and proceeded on that belief.[13]

In the years since *Counselman* and *Brown,* this Court has decided numerous cases directly or indirectly involving the question of immunity. Among all these decisions there is not a single one which casts doubt on the continuing validity of the principle that as between the questioning federal sovereign and the federal witness, immunity from prosecution is constitutionally required before the witness may be forced to testify over his claim of Fifth Amendment privilege. Indeed, this Court has on several occasions reaffirmed that rule. So, for example, it held that 11 U. S. C. §25(a) 10, 30 Stat. 544 (1898), was not co-extensive with the Fifth Amendment privilege

> because the present statute fails to afford complete immunity from prosecution. If Congress should hereafter conclude that a full disclosure of the bankrupt estate by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity. *McCarthy* v. *Arndstein,* 266 U. S. 34, 42 (1924).

And in *Hale* v. *Henkel,* 201 U. S. 43, 67 (1906), the privilege against self-incrimination was not a defense to re-

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[13] Two of the dissenters (Justices Field and Gray) had joined the Court's opinion in *Counselman.* It can hardly be supposed that they would have done so had *Counselman* stood for the proposition that something less than transactional immunity was sufficient to satisfy the Fifth Amendment.

fusing to testify after immunity from prosecution was conferred because the Fifth Amendment does not apply "if the criminality has already been taken away."

In *United States* v. *Murdock*, 284 U. S. 141, 149 (1931), this Court stated that it was an established principle "that full and complete immunity against prosecution by the government compelling the witness to answer," is the immunity which "is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547 . . ."

Twelve years later, in *United States* v. *Monia*, 317 U. S. 424, 428 (1943), it was noted that *Counselman* "indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege." Similarly, in 1949 this Court stated:

> Through *Counselman* v. *Hitchcock*, 142 U. S. 547, it was established that absolute immunity from federal criminal prosecution for offenses disclosed by the evidence must be given a person compelled to testify after claim of privilege against self-incrimination. To meet that requirement Congress amended the immunity provisions of the Interstate Commerce Act, 24 Stat. 383, §12, that protected a witness from use against him of evidence so given in any subsequent criminal proceeding so as to provide [transactional immunity]. . . . This remission of responsibility for criminal acts met the 'absolute' test of the constitutional provision against self-incrimination. *Smith* v. *United States*, 337 U. S. 137, 146-7 (1949).

And again, in *Adams* v. *Maryland*, 347 U. S. 179 (1954), even while holding that a federal statute providing use

immunity could be invoked to prevent the use in state court of evidence given before a Senate Committee, the Court observed that the statute itself could not compel that Senate testimony: it was inadequate to supplant the privilege against self-incrimination because it was "an act not providing 'complete' immunity from prosecution." *Supra* at 182.

In *Ullman* v. *United States,* 350 U. S. 422 (1956), this Court upheld the Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. §3486(c), which provided for transactional immunity, on the authority of *Brown* v. *Walker, supra.* Writing for the majority, Justice Frankfurter noted that in enacting Section 3486(c) Congress had provided "that immunity from prosecution which the Constitution requires." *Id.* at 436, fn. 12.[14]

Four years later, in *Reina* v. *United States,* 364 U. S. 507 (1960), a witness refused to testify before a federal grand jury on the ground that the immunity afforded him by 18 U. S. C. §1406 was not co-extensive with the privilege against self-incrimination. This Court rejected that

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[14] The statute was upheld over the dissent of Justices Douglas and Black who argued at length that even transactional immunity, much less use immunity, was not co-extensive with the privilege against self-incrimination. 350 U.S. at 440-455. In this connection it should be noted that the Solicitor-General, while Dean of Harvard Law School, expressed the view that the Fifth Amendment requires that a witness be afforded at least transactional immunity and perhaps even greater protection. Referring to Section 3486(c), Mr. Griswold said: "This statute gives a protection against prosecution, and thus meets the literal objective of the Constitution. Nevertheless, because I attach so much importance to the Fifth Amendment and the values which it symbolizes, I look with misgivings upon this statute." Griswold, *The Fifth Amendment Today* (Harvard University Press, 1962), p. 80.

argument because "in safeguarding him against future federal and state prosecution 'for or on account of any transaction, matter or thing concerning which he is compelled' to testify, this statute grants him immunity fully coextensive with the constitutional privilege." *Supra* at 514.

Thus in the years between 1892 and 1960 the Fifth Amendment requirement that as between the questioning sovereign and the witness, transactional immunity must be conferred before the privilege can be displaced remained, through numerous decisions of this Court, not only unquestioned, but was often reaffirmed. In fact, transactional immunity was so firmly embedded in our jurisprudence that in 1956 this Court could observe that it "has become part of our constitutional fabric." *Ullman, supra* at 438.

In the present case, the Court of Appeals sustained the 1970 compulsory testimony provision on the basis of *Murphy* v. *Waterfront Commissioner*, 378 U. S. 52 (1964).[15] Analysis of that decision, however, makes clear that such reliance is misplaced.

In *Murphy*, a witness before a bi-state investigating commission refused to testify despite a grant of immunity from prosecution in either state, on the ground that his answers might tend to incriminate him under federal law, to which the statutory grant of immunity did not purport to extend. Disapproving earlier decisions, this Court first held that "the constitutional privilege against self-incrimination protects a state witness against federal as well as state law and a federal witness against incrimination un-

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[15] See 440 F. 2d at 956-7.

der state as well as federal law." 378 U. S. at 77-78.[16] Thus *Murphy*, which is now cited by the government to support a "niggardly" interpretation of the Fifth Amendment, *Ullman, supra*, at 426, in truth *broadened* the scope of protection that the Amendment requires. Proceeding then to the question of "what effect this holding has on existing state immunity legislation," *id.* at 78, the *Murphy* court concluded that "a state witness may not be compelled [by virtue of a state immunity provision] to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.*, at 79.

It should be evident that this rule in no way affects the *Counselman* requirement of immunity from prosecution by the questioning sovereign. Nowhere in Justice Goldberg's opinion for the Court is there the slightest disapproval of the continuing vitality of the standard of transactional immunity as the measure of protection to be afforded a federal witness in the federal jurisdiction. Rather it is clear that the *Murphy* court was addressing itself to the problems of federalism that arise in a dual sovereignty situation. The Court itself stated that the issue presented was "whether, absent an immunity provision, *one jurisdiction* in our federal structure may compel a witness to give testimony which might incriminate him under the laws *of another jurisdiction*." 378 U. S. at 54 (emphasis added). As the Court then noted, the exclusionary rule it was formulating flowed from the need

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[16] *United States* v. *Murdock*, 284 U.S. 141 (1931); *Feldman* v. *United States*, 322 U.S. 487 (1944); and *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958), insofar as they conflicted with that holding, were found to be a "deviation," *supra* at 77, from the proper construction of the Fifth Amendment.

to "accommodate the interests of the State and Federal Governments in investigating and prosecuting crime." *Id.*

We believe that the *Murphy* standard is the correct standard where the interests which were at stake in *Murphy* are present. But where, as here, those interests have no application, then, too, the standard has no application. Having held that the Fifth Amendment privilege protects a state witness from incrimination under federal as well as state law, the *Murphy* court was faced with two alternatives in defining the measure of protection against incrimination under federal law. On the one hand, it might hold that the Fifth Amendment demands immunity from federal prosecution whenever a state witness testifies pursuant to a grant of immunity from state prosecution. But to hold that a state witness *automatically* acquired immunity from *federal* prosecution whenever the state granted him immunity from state prosecution would allow a return to the thoroughly discredited "immunity baths" of the past, when corrupt prosecutors would intentionally and enthusiastically authorize grants of immunity in order to protect bedfellows from prosecution for a crime which had been committed. If this alternative had been adopted in *Murphy*, it would have been possible to preclude federal prosecution simply by conferring immunity from state prosecution. Federal attorneys would have had to stand by helplessly while state officials unscrupulously but effectively precluded trial and punishment of a federal offender.

There was a second alternative, however, the one adopted in *Murphy*, which would afford the state witness adequate protection without in any way allowing possible interference with the law enforcement responsibilities of the separate federal jurisdiction. By demanding immunity

from federal use of testimony compelled by a state immunity grant, the Court made extremely remote the possibility of incrimination under federal law by testifying in the second and separate jurisdiction. But by not assuring automatic immunity from federal prosecution as a result of the state compelled testimony, the Court avoided any state interference with federal law enforcement prerogatives. The federal jurisdiction was just as free after the state testimony as before it to pursue and punish violators of federal law. In the Court's language, the *Murphy* rule "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U. S. at 79. The interests of each sovereign, competing against each other in the *Murphy* situation, were thereby neatly and properly reconciled.[17]

In the present case, only one jurisdiction is involved and, consequently, the federal-state problems which arose in *Murphy* are absent. In particular, there is no need to protect the law enforcement responsibilities of the federal jurisdiction from the possibility of unscrupulous

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[17] That *Murphy* was concerned solely with the proper adjustment of federal-state law enforcement interests was emphasized forcefully by Justice Harlan in his concurring opinion. Refusing to give constitutional status to the standard of immunity from federal use of state compelled testimony, Justice Harlan nevertheless adhered to that standard under the Court's supervisory power. He spoke of the need for a rule protective of the values expressed by the privilege against self-incrimination "without in any way interfering with the independent action of the States and the Federal Government in their respective spheres," 378 U.S. at 91, and noted that the rule adopted in *Murphy* was an "adjustment between state investigations of local crime and federal prosecution for federal crime." *Id.* at 91-92.

state encroachment, because under Sections 6002-3 it is the federal jurisdiction alone, acting through the Attorney-General or a designated assistant and the local United States Attorney, which controls the granting of immunity in the federal jurisdiction. The standard in the dual-sovereignty circumstances has, therefore, no relevance to the facts of this case.

That *Murphy* was not intended to modify the requirement of transactional immunity where only the federal jurisdiction is involved was amply demonstrated by this Court by its opinion in *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965). In determining the constitutionality of Section 4(f) of the Subversive Activities Control Act of 1950, 64 Stat 992, 50 U. S. C. §783(f), the Court said:

> In *Counselman* v. *Hitchcock,* 142 U. S. 547, decided in 1892, the Court held 'that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . .,' and that such a statute is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard . . .' by affording 'absolute immunity against future prosecution for the offence to which the question relates.' *Id.* at 585-586. *Measured by these standards,* the immunity granted by §4(f) is not complete. 382 U. S. at 80 (Emphasis added).

Thus, more than a year after *Murphy*, this Court still embraced transactional immunity as the Fifth Amend-

ment requirement where only a single jurisdiction is involved.[18]

The Fifth Amendment prohibition against prosecution of a grand jury witness for a transaction to which his compelled testimony relates is supported not only by an unbroken line of decisions of this Court over the past eighty years but by an analysis of the values the privilege against self-incrimination is intended to protect. This Court has declared that the privilege

> reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev. 1961), 317; our respect

[18] And in *Stevens* v. *Marks*, 383 U.S. 234 (1966), the Court noted that because the contempt conviction there for refusing to testify before a grand jury was invalid on other grounds, it did not need to determine whether the immunity purportedly conferred in that case, which was immunity from the direct or indirect use of the grand jury testimony, "constitutes that 'absolute immunity against further prosecution' about which the Court spoke in *Counselman* v. *Hitchcock*, 142 U.S. 547, 586, and which the Court said was necessary if the privilege were to be constitutionally supplanted. And see *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79-81." *Id.* at 244-45.

> for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' *United States* v. *Grunewald,* 233 F. 2d 556, 581-582 (Frank, J., dissenting), rev'd. 353 U. S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' *Quinn* v. *United States,* 349 U. S. 155, 162, 99 L. Ed. 964, 972, 75 S. Ct. 668, 51 A.L.R. 2d 1157. *Murphy, supra* at 55.

And see 8 Wigmore, *Evidence* (McNaughton Rev. 1961), pp. 302 *et seq.*

As Justice Brennan has noted, use immunity offends many if not most of the Fifth Amendment interests enunciated in *Murphy.*[19] Certainly, for example, it drastically lessens the requirement that "the government in its contest with the individual . . . shoulder the entire load." The government attorney is almost always not only present in the grand jury proceeding but actually conducting the questioning. His eliciting from a witness testimony which may be self-incriminating lessens the responsibility assigned the government in our adversarial system of criminal justice of building the case against a defendant wholly on its own. When a witness is compelled to relate the full and detailed story of how, when and why he in fact committed a violation of federal law, he is substantially reducing the obligation of the government to shoulder the entire load in going forward with the prosecution that is still permitted under Section 6002. Despite the

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[19] *Piccirillo* v. *New York,* 400 U.S. 548, , 91 S. Ct. 520, 530 (1971) (dissenting from dismissal of certiorari).

fact that the government attorney's source of evidence to be introduced at trial must, under the 1970 act, be wholly independent of the evidence adduced before the grand jury, nevertheless, the grand jury testimony tells the government attorney in the greatest detail precisely what the evidence is against the witness for which an independent source must be constructed. In short, even if the witness' testimony is not itself evidence which can be used directly or indirectly at trial, it informs the prosecution what the facts of the matter are which *can and should* be proved at trial. In *Counselman* v. *Hitchcock,* the Court disapproved use immunity on this ground, observing that it can never afford "protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime," 142 U. S. at 586, for which the witness may then be prosecuted.

The standard in judging whether or not an immunity is co-extensive with the privilege against self-incrimination, *Counselman* v. *Hitchcock, op. cit.,* is whether the witness and the questioning jurisdiction are in the same position vis-a-vis each other after the testimony is given under compulsion as they would be if the witness properly pleaded the privilege and no immunity was offered. See *Murphy* v. *Waterfront Commissioner,* 378 U. S. at 79. In enabling the government to learn every detail of every element of a federal offense the witness may have in fact committed, and for which he may then be prosecuted, Section 6002 plainly does not leave the witness and the questioning jurisdiction in the same balance they were in before the testimony was compelled. After testimony the government attorney then (1) knows whether a case can subsequently be made against the witness and (2) knows the facts for which an independent source must be constructed.

With respect to knowledge of the first element, the very determination to seek an independent source of information, i.e., the determination to prosecute, may well spring from the testimony compelled under a grant of use immunity. Examining a witness under compulsion before a grand jury enables the government to determine whether or not the witness is probably guilty of a federal offense. If the evidence shows the witness is probably guilty then an attempt will be made to construct an independent source for that evidence to be used in a prosecution, whereas such an attempt might well never have been made if the witness had not testified. In other words, *but for* the testimony compelled through use immunity, the decision to prosecute and therefore to create an independent source would often not be made. In exchange for information, the government has offered only the increased likelihood of prosecution.

The prosecutor also gains knowledge of the facts for which an independent source can then be created. It is one thing to come upon facts by means of an untainted source when the facts are being unearthed *de novo;* it is quite another to be able to construct an independent source when the government already knows exactly what it is looking for. In the former situation, an untainted source is developed while working toward an unknown end. In the latter, the source is constructed while the government knows precisely where it is going. This result-orientation enables even the most inept sleuth to eventually construct an independent source.

The effect of the knowledge gained by the prosecutor through his compelling testimony by providing federal use immunity is thus properly summarized by observing that a person is in fact much worse off in regard to the danger of federal prosecution and conviction than if he

had remained silent. That is a fundamental constitutional flaw in the 1970 compulsory testimony statute. See *Murphy, supra* at 79.

In noting the Fifth Amendment interest in "a fair state-individual balance," this Court also spoke of the requirement that "the government . . . leave the individual alone until good cause is shown for disturbing him." *Op. cit.* Section 6002 poses a substantial threat to the survival of that constitutional value. By retaining the ability to prosecute, the statute allows for, indeed encourages, the "fishing expeditions," *In re Dionisio, op. cit.*, to which we alluded earlier and which have become commonplace in the last year.[20] The inability subsequently to prosecute an individual if answers are to be obtained to incriminating questions deters to some extent broad and vague investigations commenced by government attorneys before a grand jury with little or no hard evidence or even indication of possible violation of federal law by a given person. For if the government attorneys have small idea who may have committed a crime or whether one has been committed, they will be less likely to offer immunity from prosecution, because they risk unintentionally immunizing from penal sanction those persons who may be primarily and principally responsible for the violation.

Allowing the compulsion of testimony by a grant of mere use immunity removes that deterrence. It encour-

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[20] As attorneys heavily involved in investigations before numerous grand juries, we have seen question after question asked of witnesses which are not designed to put before the grand jury specific facts about a specific event but, rather, are the most generla type of inquiries, frequently along the lines of: "Tell all you know about . . ." or "Give the names of all the people you met during the months of . . ."

ages the use of the grand jury and grand jury process as a broad discovery device, because it allows the asking of questions which are entirely speculative and for which the government attorneys may have no present answers, while allowing subsequent prosecution if, by chance, the fishing expedition proves rewarding.

Complementing the Fifth Amendment requirement to leave the individual alone until good cause is shown for disturbing him is "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life. . . .'" *Op. cit.* In this regard the privilege against self-incrimination acts to protect rights assured as well by the Fourth Amendment, *Boyd* v. *United States,* 116 U. S. 616, 635 (1886), and the First Amendment. *Stanley* v. *Georgia,* 394 U. S. 557 (1969).

The need to shield values implicit jointly in the Fifth and First Amendments is especially strong today. In recent months investigations before grand juries in Tuscon, Arizona; Seattle, Washington; Detroit, Michigan; Harrisburg, Pennsylvania; Washington, D. C.; and Brooklyn, New York, *all* involve investigation of persons who dissent or are thought to dissent from the political judgments of our government and who express criticism of those judgments and of those who implement them. Furthermore, the charge of conspiracy, always implicating First Amendment interests, is once more in our history "the darling of the prosecutor's nursery." There is no federal grand jury investigation commenced today to look into acts by persons opposed or thought to be opposed to present governmental policies, that does not include investigation of violation of 18 U. S. C. §371.

The question posed by United States Attorneys in these grand juries include broad inquiries into political

affiliations, organizations and discussions.[21] It would be one thing if there was a specific question relating to a political group, affiliation or discussion for which the prosecutor expected to obtain a specific answer. But this is usually not the case. Instead the inquiries are primarily "fishing expeditions" into political activity by the witness which have the side effect, either intended or unintended, of inhibiting future political activity.[22] As we have discussed, *supra,* at pp. 28-9, it is the ability to offer only use immunity which directly increases the government's ability to engage in these types of proceedings.

Finally, it can also be seen that the immunity offered by §§6002-3 is largely illusory. The statute provides that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used

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[21] E.g., the question has frequently been asked: 'What is X organization, what are its aims and purposes, and who are its members.' Or: 'Who was at a particular meeting, what was discussed, and who said what?'

[22] The Solictor-General has noted the importance of the privilege against self-incrimination as a bulwark against this kind of governmental conduct:

> Where matters of a man's belief or opinions or political views are essential elements in the charge, it may be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone. Griswold, *The Fifth Amendment Today,* supra, at 8-9.

against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." To say this *caveat* to the provision ordering the witness to testify over his claim of constitutional privilege adequately protects the Fifth Amendment interests of the witness ignores the fact that the person who will subsequently be able to prosecute the witness is the same person who elicits his testimony before the grand jury. If a person is indicted for a transaction concerning which he testified under compulsion pursuant to §6002, a motion to suppress evidence will follow virtually automatically. And a lengthy hearing, delaying the adjudication of guilt or innocence, will then be necessary to determine the possible tainting of every piece of the government's case. Even so, the hearing will be of dubious worth to the defendant. It is true that once he has shown that the transaction for which he is being prosecuted relates to his testimony before the grand jury, the government has the burden of showing that it nevertheless obtained its evidence from an independent source. But the witness would be hard pressed to examine the validity of the government's claim because all the facts which could disprove the claim are usually exclusively in the hands of the government itself.[23] It is not only a question of exposing a conscious use of grand jury testimony. Perhaps even more significant is the difficulty of detecting and establishing unconscious and unintentional use of the grand jury testimony. As Justice Brennan has noted:

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[23] Even as to those facts which are not, as Judge Motley has noted: "To say that a witness can successfully rebut the Government's proof that its source is untainted is to be naive about the imbalance which daily attends the resources of Government as opposed to those of the average defendant in a criminal case." *Kinoy, supra,* at 419.

> Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained. By hypothesis, the situation involves one jurisdiction with presumably adequate exchange of information among its various law enforcement officers. Moreover, the possibility of subtle inferences drawn from action or non-action on the part of fellow law enforcement personnel would be difficult if not impossible to prove or disprove. This danger, substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction which compelled the testimony. Concern over informal and undetected exchange of information is also correspondly less when two different jurisdictions are involved. *Piccirillo* v. *New York, supra.*[24]

We respectfully submit that because, as we have shown, the 1970 federal immunity provision fails to provide protection as broad as the mischief against which the privilege against self-incrimination seeks to guard, *Counsel-*

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[24] We would also note that whatever the reduced possibility of such an unintentional use of testimony in a situation where only one sovereign but two separate agencies within that jurisdiction are involved, see, e.g., *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation,* 426 F. 2d 619 (2nd Cir., 1970), *cert. pending,* No. 69-6 (Oct. Term, 1971), no such possibility exists here where not only is the office responsible for prosecution the office which is also responsible for presenting the evidence to the grand jury, but frequently it is the very same United States Attorney who will perform both functions.

man v. *Hitchcock, op. cit.*, it violates that constitutional provision.

In *Ullmann* v. *United States,* at a time when the cry for "law and order" was as loud as it is today and when, like today, "national security" had become a slogan in the name of which constitutional liberties were abridged, Justice Frankfurter spoke eloquently and at length for this Court of the "spirit in which the Fifth Amendment's privilege against self-incrimination should be approached." 350 U. S. at 426:

> It is relevant to define explicitly the spirit in which the fifth amendment's privilege against self-incrimination should be approached. This command of the fifth amendment ('nor shall any . . . person be compelled in any criminal case to be a witness against himself * * *') registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' [Citing Griswold, 'The Fifth Amendment Today' (1955), 7.] Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They, too, readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The founders of the Nation were not naive or disregardful of the interests of justice * * *.

No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a save a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies.

As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. It is appropriate to read the conviction expressed in a memorable address by Senator Albert J. Beveridge to the American Bar Association in 1920, a time when there was also manifested impatience with some of the restriction of the Constitution in the presumed interest of security. His appeal was to the Constitution—to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor.* To view a particular

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*"If liberty is worth keeping and free representative government worth saving, we must stand for *all* American fundamentals—not some, but all. All are woven into the great fabric of our national well-being. We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient. If one American fundamental is prostrated, others in the end will surely fall. The success or failure of the American theory of society and government, depends upon our fidelity to every one of those interdependent parts of that immortal charter of orderly freedom, the Constitution of the United States." Beveridge, The Assault upon American Fundamentals, 45 Reports of American Bar Ass'n, 188, 216 (1920).

provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution. 350 U. S. at 426-9.

If the Court adheres to the "spirit" of which it spoke in *Ullman,* the 1970 immunity act must necessarily be declared unconstitutional.

CONCLUSION

For the aforegoing reasons the judgments of contempt must be reversed.

Respectfully submitted,

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Certificate of Service

This is to certify that a copy of the foregoing brief was served upon Hugh Manes, 3440 Wilshire Blvd., Suite 608, Los Angeles, California 90010; and William Smith, 3325 Wilshire Blvd., Suite 901, Los Angeles, California 90010, Counsel for Petitioners; and upon Erwin Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, Counsel for Respondent, by first class mail, postage prepaid, this 30 day of July 1971.